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UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF CALIFORNIA SACRAMENTO DIVISION	UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF CALIFORNIA
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In re) Case No. 06-21891-A-7
)
THOMAS PISHOS,) Docket Control No. PA-1
)
) Date: August 31, 2009
Debtor.) Time: 9:00 a.m.

MEMORANDUM

Ghaus Malik and National City Mortgage move to disqualify counsel for the trustee, Desmond, Nolan, Livaich & Cunningham (DNLC), on the grounds that (1) it is not a disinterested party within the meaning of 11 U.S.C. § 327 due to his representation of the trustee's predecessor, trustee Kenneth Sanders, and (2) it has not complied with the disclosure requirements of Fed. R. Bankr. P. 2014.

The trustee opposes the motion, arguing: (a) the movants lack standing because they are not creditors; (b) this motion has been filed for an improper purpose; (c) the motion is untimely inasmuch as DNLC and the movants have been involved in litigation for more than a year and a half; (d) the movants have not shown that DNLC is an interested party; (e) DNLC hold no, nor represents, adverse interest; and (f) DNLC has violated no disclosure requirements.

1 Subject to court approval, 11 U.S.C. § 327(a) permits a
2 trustee to employ a professional to assist the trustee in the
3 administration of the estate. Such professional must "not hold
4 or represent an interest adverse to the estate, and [must be a]
5 disinterested [person]." 11 U.S.C. § 327(a).

6 "The [professional's employment] application shall state the
7 specific facts showing the necessity for the employment, . . .
8 and, to the best of the applicant's knowledge, all of the
9 person's connections with the debtor, creditors, any other party
10 in interest, their respective attorneys and accountants, the
11 United States trustee, or any person employed in the office of
12 the United States trustee. The application shall be accompanied
13 by a verified statement of the person to be employed setting
14 forth the person's connections with the debtor, creditors, any
15 other party in interest, their respective attorneys and
16 accountants, the United States trustee, or any person employed in
17 the office of the United States trustee." Fed. R. Bankr. P.
18 2014(a).

19 A motion to disqualify counsel is a drastic measure which
20 courts should hesitate to grant unless absolutely necessity.
21 Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983). Such
22 motions are often tactically motivated. Thus, the movant must
23 satisfy a high standard of proof. Evans v. Artek Sys. Corp., 715
24 F.2d 788, 791-92, 794 (2nd Cir. 1983). The motions, as a result,
25 are subject to particularly strict judicial scrutiny. Optyl
26 Eyewear Fashion Int'l Corp. v. Style Cos., Ltd., 760 F.2d 1045,
27 1049 (9th Cir. 1985). To be justified, a disqualification motion
28 must establish present concerns of impropriety, and not merely

1 anticipatory and speculative concerns. City of Long Beach v.
2 Standard Oil Co. of California (In re Coordinated Pretrial
3 Proceedings in Petroleum Prods. Antitrust Litigation), 658 F.2d
4 1355, 1361 (9th Cir. 1981).

5 This motion is brought in the bankruptcy case, not in the
6 ongoing adversary proceeding between the parties. The movants,
7 then, are not asking the court to disqualify DNLC in its capacity
8 as counsel for the plaintiff/trustee in pending litigation, but
9 as counsel for the trustee of the bankruptcy estate. The movants
10 have filed no claim against the estate, nor do they have an
11 interest in the debtor.

12 Also, even if the movants might be creditors of the estate,
13 they have maintained in the pending litigation that the estate
14 does not have sufficient assets to make any distribution to
15 unsecured creditors. So, even if the movants are unsecured
16 creditors, they do not have economic stake in the outcome of the
17 estate's administration.

18 Consequently, the standing of the movants to challenge the
19 qualifications of the trustee's counsel is dubious at best.

20 And, the movants have been involved in litigation with the
21 trustee since January 2008, over one and one-half years ago. For
22 the movants to make this motion at this late date is
23 disingenuous. Disqualifying DNLC at this time would be grossly
24 prejudicial to the trustee and the estate. The estate would have
25 to incur substantial expenses in employing and educating any new
26 counsel.

27 Further, the movants have produced no evidence showing that
28 DNLC has an interest adverse to the estate or that the prior

1 trustee, Mr. Sanders, whom DNLC also represented, has an interest
2 adverse to the estate. The movants cite Kagan v. Stubbe (In re
3 El San Juan Hotel Corp.), 239 B.R. 635 (B.A.P. 1st Cir. 1999), in
4 support of the argument that DNLC has actual and potential
5 conflict of interest in representing Ms. Smith, given its prior
6 representation of Mr. Sanders.

7 However, in San Juan Hotel, the original trustee had been
8 forced out by creditors and a successor trustee was appointed "to
9 investigate the management of" the original trustee. Id. at p.
10 639. Despite this history, counsel for the successor trustee
11 contemporaneously represented the original trustee in a different
12 bankruptcy case. Id. at p. 640. This created a disqualifying
13 interest for counsel. Counsel could not represent both the
14 estate and the former trustee against whom the estate might have
15 a claim. Id. at 649.

16 In this case, Mr. Sanders resigned his position as trustee
17 because he had accepted a position with a law firm that
18 represented the son and former business partner of the debtor.
19 See Docket No. 84. Mr. Sanders was not forced out. He
20 voluntarily left his position as a trustee in order to avoid a
21 conflict. Ms. Smith was appointed, not to investigate Mr.
22 Sanders, but to simply continue the administration of the case.

23 The court will not disqualify DNLC, especially this late
24 into the proceedings, when no clear and definite improprieties
25 have been identified. Coordinated Pretrial Proceedings in
26 Petroleum Prods. Antitrust Litigation at 1361; see also Universal
27 Bank v. Marvel (In re Marvel), 251 B.R. 869, 871 (Bankr. N.D.
28 Cal. 2000). In discussing conflict of interest, the movants

1 refer to "claims the estate *may have* against [Ms. Smith's]
2 predecessor." See Motion at 17. But, no such claims have been
3 identified.

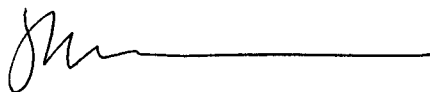
4 Turning to the disclosure issue, DNLC's application for
5 employment as counsel of Ms. Smith admittedly contains no
6 reference to its prior employment with Mr. Sanders. However, its
7 prior application to represent Mr. Sanders is a matter of public
8 record in this case. While the better practice would have been
9 to disclose the representation of the prior trustee, given that
10 the court approved that employment in the same case, given that
11 both applications were a matter of public record available to the
12 movants and parties in interest, given the advanced stage of the
13 proceedings and the absence of present actual conflicts, the
14 nondisclosure is not fatal. The court concludes that, taking the
15 two employment applications together, there was substantial
16 compliance with Rule 2014(a).

17 Finally, the court notes that the movants are represented by
18 very experienced and competent bankruptcy counsel. It is
19 difficult to believe, and the court does not believe, that
20 counsel did not apprise herself of the entire record in this case
21 after her first appearance. If there was a genuine problem, it
22 would have been brought to the court's attention more seasonably.

23 A separate order denying the motion will be entered.

24 Dated: 3 Nov. 2009

25 By the Court

26 

27 Michael S. McManus, Judge
28 United States Bankruptcy Court

CERTIFICATE OF MAILING

I, Susan C. Cox, in the performance of my duties as a
judicial assistant to the Honorable Michael S. McManus, mailed by
ordinary mail to each of the parties named below a true copy of
the attached document.

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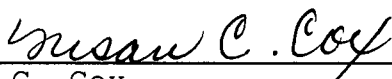
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Dated: November 3, 2009



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